APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 489-57

(Decided June 8, 1960)

JOSE V. BACA, ET AL.

v.

THE UNITED STATES

Mr. Edgar H. Brauer for the plaintiffs. *Messrs. Lorenzo A. Chavez, Melvin H. Robins, Thurman Arnold, Chavez, Ortega & Robins* and *Arnold, Fortas & Porter* were on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

Opinion

PER CURIAM: This case, which is a suit by plaintiffs as civilian bus drivers at a military post to recover overtime compensation, was referred under Rule 45(a) to Mastin G. White, a trial commissioner of this court, with directions to make findings of fact and to recommend conclusions of law which the commissioner has done in a report filed November 10, 1959.

The court having considered the evidence, the briefs and argument of counsel and being in agreement with the recommendations of the commissioner hereby adopts his opinion and findings which are hereinafter set forth as the basis for its judgment in this case. Plaintiffs Jose V. Baca (1), Floyd D. Campbell (4), J. E. Jones (13), Rodolpho Martinez (17) and James M. Simpson (22) are entitled to recover and judgment will be entered to that effect with the amount

of recovery to be determined pursuant to Rule 38(c). Plaintiffs Verney R. Bunch (3), Cecil R. Gillespie (9), Wertie L. Haney (12) and Vick V. Serna (21) are not entitled to recover, and the petition as to them will be dismissed.

It is so ordered.

MADDEN, *Judge*, dissenting:

The court has decided that the plaintiffs are not entitled to be paid for all of the time spent at White Sands because, during several hours of that time, "they were actually off duty and not performing any services for the Government, but were free to go where they pleased and do what they pleased." The quoted statement is not applicable to the plaintiffs' situation, unless the plaintiffs had such peculiar mentalities and tastes that the only things they pleased to do were to lie under the buses in the parking lot to get out of the sun, or to go to the snack bar to get a cup of coffee, or to go to the library and read, or to go swimming in the pool.

It was, as a practical matter, impossible for them to get off the Army post during their four hours of unpaid time. There was no public transportation from the post. They of course could not have their own automobiles, because they drove to the post in the Army buses. They had to be at the Army post in order to do the Army's work of driving the buses back to the cities where the other people who worked at the post lived. Try as one will, he cannot think of any practical and economical way in which the Army could have had these buses driven, morning and evening, and the "B" runs made during the day, without requiring the plaintiffs to wait four hours for the evening run. The plaintiffs were, therefore, at the post in the desert for Army purposes, and pursuant to the statute, and the judicial precedents, they are entitled to be paid for their time.

If one is hired to drive a party of geologists out to a point in the desert and is told that his party will return to

the vehicle in four hours, and that in the meantime he may do as he pleases, who would say that his pay did not run on during the four hours? Would the fact that there were geological treatises or comic books in his vehicle, or coffee in a thermos jug, or water in a nearby pool prove that he was not there for his employer's purposes and benefit? Would he not have been "engaged to wait"? *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 137; *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133; *Missouri K. and T. Ry. Co.* v. *United States*, 231 U.S. 112, 119. And would the fact that the same event occurred every working day over a period of months or years affect its legal consequences?

Opinion of the Commissioner

This action was instituted by the plaintiffs for the recovery of overtime compensation under the portion of section 23 of the act of March 28, 1934 (48 Stat. 509, 522), as amended (5 U.S.C., 1958 ed., 673c), which provides:

> * * * That the regular hours of labor [for wage-board employees of the Government] shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one half.

At the request of plaintiffs' counsel, and with the acquiescence of defendant's counsel, the trial was limited under Rule 22(b) to the claims of those plaintiffs who are mentioned in findings 27-35, and the proceedings with respect to all other plaintiffs were held in abeyance. In this connection, counsel for the plaintiffs conceded that if none of the plaintiffs named in findings 27-35 is entitled to recover, none of the other plaintiffs is entitled to recover.

During some part of the 6-year period immediately preceding the date (October 18, 1957) of the filing of the petition in this case, each of the plaintiffs was employed by the Department of the Army as a civilian bus-driver at a military post which was known during the period in question

as the White Sands Proving Ground, but which is now known as the White Sands Missile Range. (For the sake of convenience, this military post will usually be referred to in the opinion as "White Sands.") The plaintiffs' compensation schedules were fixed by the Army-Air Force Wage Board.

White Sands is located in a desert region of southern New Mexico. The nearest sizable towns are Las Cruces and Alamogordo, New Mexico, and El Paso, Texas. The headquarters area at White Sands is approximately 28 miles northeast of Las Cruces, approximately 52 miles southwest of Alamogordo, and approximately 51 miles north of El Paso (over the most direct route).

The White Sands bus service was originally established in order to provide transportation 5 days per week (Monday through Friday) for civilian employees and military personnel who worked at White Sands but who lived in or near Las Cruces, Alamogordo, or El Paso. Morning bus runs from each of the three towns mentioned to White Sands, and afternoon bus runs from White Sands to the three towns, were established. A one-way bus fare of 25 cents was collected from the bus riders. A similar morning and afternoon bus service between Hatch, New Mexico, and White Sands was established later during the period involved in the present suit. The bus drivers lived in the various towns from which service to White Sands was provided under the system.

Providing the bus service required each bus driver, as a normal pattern of operation, to work each regular workday for approximately 2 hours in the morning (from about 6 to 8 a.m.) in operating a bus from the town of his residence to White Sands and in performing other duties directly related to such operation, and to work for another period of approximately 2 hours in the afternoon (from about 4 to 6 p.m.) in operating a bus from White Sands to the town of

his residence and in performing other duties directly related to such operation.

During the interval of approximately 8 hours between about 8 a.m. and about 4 p.m., the bus drivers from time to time were required while at White Sands to perform other work not directly involving the transportation of passengers, as follows:

(1) If a bus needed gasoline, oil, or water, the need was supplied by the driver from facilities provided for the purpose by the management. While the evidence on the point is not clear, it is inferred that a bus driver did not devote more than 1 hour per week to such work, on the average.

(2) It was usually necessary for a driver to wash his bus once or twice each week, and this required anywhere from 45 to 90 minutes of a driver's time per week.

(3) Each driver was required to perform a rather thorough weekly check on his bus and to make a report concerning the results of the check. The bus was greased during the course of the checking operation. This weekly checking and greasing required an average of approximately 1 hour per week.

(4) If a bus needed mechanical repairs, the bus driver drove the bus a short distance to the repair shop. Thereafter, the driver was required to go to the repair shop and get the bus at 4 p.m. (or earlier if he preferred and the repairs had been completed) in order that it might be used for the afternoon run to the town of his residence. However, this type of work was infrequent and, if averaged out on a weekly basis, it required only a few minutes of a bus driver's time per week.

(5) Another task performed by the bus drivers was the "policing" of the bus area each day in order to remove trash from the area. It appears that the drivers did not devote more than 10 or 15 minutes per day, on the average, to this type of work.

(6) If a bus tire needed fixing, it was the responsibility of the driver to remove the wheel containing the defective tire, put on a spare wheel and tire, and take the defective tire (on its wheel) to the tire-repair shop. This type of work was infrequent and, if averaged out on a weekly basis, required only a negligible amount of a bus driver's time per week.

In order to make provision for the performance of the duties outlined in the preceding numbered paragraphs, the management at White Sands, during the early part of the period involved in this litigation, designated the morning hours until 12 noon of each workday as on-duty time for the bus drivers. Hence, each driver had approximately 20 hours of on-duty time per week for the performance of duties that required 5 or 6 hours of actual work, on the average. The time from 12 noon until 4 p.m. of each workday was considered by the management at White Sands as off-duty time for the drivers.

Sometime in 1952, because congestion at the single wash rack occasionally made it difficult for some drivers to wash their buses during the morning duty hours, an arrangement was made by the management at White Sands whereby approximately half of the bus drivers were considered as being on duty during the morning until 12 noon and off duty from 12 noon until 4 p.m., while the remainder of the drivers were considered as being off duty from 8 a.m. until 12 noon and on duty after 12 noon.

Therefore, except for certain special situations that will be discussed subsequently, each bus driver had a period of approximately 4 continuous hours each workday, either in the morning or in the afternoon, when he was regarded by the management at White Sands as being off duty. This "off-duty" time intervened between periods of duty.

The bus drivers were paid on the basis of an 8-hour day and a 40-hour week for the services that are involved in

this litigation. The 8 hours of daily working time for which a driver was compensated consisted of the 2 hours in the morning involved in operating a bus from the town of the bus driver's residence to White Sands (and related activities); the 2 hours in the afternoon involved in operating the bus from White Sands back to the town of the driver's residence (and related activities); and another 4-hour period of duty either in the morning or in the afternoon. No compensation was received for the "off-duty" time that intervened between periods of duty.

In so far as the management at White Sands was concerned, the bus drivers were free to go where they wished and to do what they pleased during their "off-duty" time. Because of White Sands' isolation, however, and the lack of any practicable means of leaving the post (at least during the early part of the period involved in this action), the bus drivers generally spent their "off-duty" time at White Sands, waiting for their subsequent duties to begin. During the greater part of the period involved in this suit, the drivers' waiting time was usually spent in or near their parked buses, but in 1956 a waiting room, with facilities for recreation, was provided for the drivers by the management at White Sands. The drivers went to a cafeteria on the post and to the post exchange whenever they wished to do so; and they could have gone to the post library or to a swimming pool on the post, but it appears that none of them did.

The first question to be decided is whether the daily 4-hour periods which the management at White Sands regarded as being off-duty time for the bus drivers were actually "hours of labor," within the meaning of that term as used in the governing statute. In this connection, it is clear at the outset that an employee need not be engaged continuously in physical or mental exertion on behalf of his employer in order to be in a working status and thus entitled to compensation. On the contrary, time spent while

waiting to perform actual labor constitutes working time under some circumstances and, therefore, is compensable. However, it is characteristic of the cases so holding that they involved situations where the employee was under orders from the employer to wait at a particular place, the employee was liable to be called upon at any moment for the performance of actual labor, and he was not at liberty to go away for the purpose of engaging in other activities of his own choice. *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944); *Farley* v. *United States*, 131 Ct. Cl. 776, 779 (1955); see *Missouri, K. & T. Ry. Co.* v. *United States*, 231 U.S. 112, 119 (1913). In other words, waiting time is working time only if the employee has been "engaged to wait." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 137 (1944). It necessarily follows that in a situation where an employee has complete freedom during a waiting period to go where he pleases and do what he pleases, so long as he is at the proper place when the time arrives for the beginning of his actual labor, the waiting time is not working time, and is not compensable. *Abbott* v. *United States*, 138 Ct. Cl. 459, 464 (1957).

Upon applying the principles discussed above to the facts of the present case, the conclusion seems inescapable that the daily 4-hour waiting periods at White Sands which were regarded by the management as off-duty time did not constitute "hours of labor" and, therefore, are not compensable under the governing statute. As previously stated, the employees were free to go where they pleased and to do what they pleased during these waiting periods. Their election generally to remain at White Sands during the 4-hour waiting periods was not predominantly for the benefit of the Government, but, instead, was due to the isolation of the post in a desert area and the inconvenience of going elsewhere. See *Armour & Co.* v. *Wantock*, *supra*, at p. 133.

With respect to the point discussed above, it should be mentioned that during the 6 years involved in this litigation

there were some occasions when a bus driver spending an off-duty period at White Sands would be asked by a supervisor to help "police" the bus area, or to drive a bus to the repair shop, or to go to the repair shop and get a bus that had been repaired, or to perform some other chore requiring a few minutes of the bus driver's time. However, such instances were infrequent and the amount of working time involved in them was inconsequential. Therefore, such instances may properly be disregarded in the present litigation. *Armstrong v. United States* (Ct. Cl. No. 145-56, decided January 14, 1959, p. 6 of slip copy, cert. denied, 361 U.S. 825).

The plaintiffs contend that, in any event, the daily 4 hours of so called "off-duty" time must be considered as "hours of labor" during the period between November 1954 and March 1957 because of the promulgation of a pertinent regulation by the Department of the Army.

On September 1, 1954, section 210 (b) of the act of that date (68 Stat. 1105, 1112) amended section 604(a) of the Federal Employees' Pay Act of 1945 (59 Stat. 295, 303) by adding a paragraph which provided in part as follows:

> (2) Except where the head of each * * * department, establishment, or agency * * * determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he shall provide, with respect to all officers and employees in his organization, * * * that breaks in working hours of more than one hour shall not be scheduled in any basic workday. [5 U.S.C., 1958 ed., 944(a)(2).]

Although (with certain exceptions not pertinent here) the Federal Employees Pay Act of 1945 is declared by section 102 of the act (5 U.S.C., 1958 ed., 902(e)) to be inapplicable to wage-board employees, the Department of the Army on November 3, 1954 revised its Civilian Personnel Regulations

so as to provide (among other things) that, both with respect to employees holding positions subject to the Classification Act and wage-board employees:

> Daily tours of duty will not be broken by off duty periods of more than one hour.

It was further provided in the amended regulations that:

> * * * Exception * * * will be made only in those cases where commanding officers of installations determine that their application would seriously handicap the performance of a *function* or where substantially increased costs would result.

Notwithstanding the promulgation by the Department of the Army in November 1954 of the amended regulations referred to in the preceding paragraph, the management at White Sands thereafter continued to operate the bus service on a split-shift basis, as previously discussed, with the bus drivers having a 4-hour period of "off duty" time each workday between tours of duty. However, until March 28, 1957, there was no formal written finding by the commanding officer of the post that the application to bus drivers at White Sands of the departmental regulation declaring that "Daily tours of duty will not be broken by off duty periods of more than one hour" would seriously handicap the bus service or result in substantially increased costs. The plaintiffs argue that an exception to this departmental regulation could be based only upon a formal written finding of the sort just mentioned and, accordingly, that no exception in the case of the bus drivers at White Sands was permissible during the period between November 3, 1954 and March 28, 1957.

It was not necessary for the Department of the Army to provide, with respect to wage-board employees such as the bus drivers at White Sands, that "Daily tours of duty will not be broken by off duty periods of more than one hour."

However, when the Department by regulation did extend to wage-board employees the benefit of such a provision, the regulation thereupon became binding on, and could not properly be ignored by, the civilian and military officials of the Department, so long as the regulation remained in effect. *Service* v. *Dulles*, 354 U.S. 363, 388 (1957); *Vitarelli v. Seaton*, 359 U.S. 535, 539-540 (1959); *Watson* v. *United States*, 142 Ct. Cl. 749, 756 (1958). In this connection, though, it will be noted that the regulation, in providing for the making of exceptions to the general rule, did not prescribe any particular form for the essential finding. It merely stated that exceptions could be made in those instances where commanding officers of installations *determined* that the application of the general rule would seriously handicap the performance of a function or result in substantially increased costs.

In the present case, although the commanding officer at White Sands did not make any formal written determination of the sort contemplated by the "exception" provision of the regulation until March 28, 1957, the purport of the pertinent evidence warrants an inference that the commanding officer continued to operate the bus service on a split-shift basis during the period between November 3, 1954 and March 28, 1957 because of his conclusion that to operate the service on a straight-shift basis would, in fact, seriously handicap the performance of the bus-service function or result in substantially increased costs, or both. Therefore, it appears that there actually was no violation in this case after November 3, 1954 of the departmental regulation establishing the general rule with respect to wage-board employees (including the bus drivers at White Sands) that "Daily tours of duty will not be broken by off duty periods of more than one hour," but authorizing exceptions in appropriate cases.

Furthermore, even if it were to be concluded that the commander at White Sands violated the departmental regu-

lation between November 3, 1954 and March 28, 1957 by operating the bus service on a split-shift basis, this would not help the plaintiffs' cause. The commander, of course, would have been answerable for the violation to his superiors in the departmental hierarchy. The violation would not, however, have entitled the bus drivers to additional compensation by converting into "hours of labor" time during which they were actually off duty and not performing any services for the Government, but were free to go where they pleased and do what they pleased.

We turn now to the consideration of a special situation that affected some bus drivers during certain weeks in the years 1952-1954. Sometime in 1952, the management at White Sands began to establish a free type of bus transportation known as "Class B" service. (The morning and afternoon transportation for pay between certain residential towns and White Sands, previously discussed in this opinion, was known as "Class A" service.) On a Class B run, free transportation was provided over a specified route and on the basis of a fixed schedule for military personnel or civilian employees, or both, needing such service in connection with the performance of their official duties. A typical Class B run was between two or more specified points within the exterior limits of the post and involved four round trips per day, each round trip requiring approximately 1 hour for completion. The first round trip would be made between approximately 8 and 9 o'clock in the morning; the second, between approximately 10:30 and 11:30 in the morning; the third, between approximately 12 noon and 1 o'clock in the afternoon; and the fourth, between approximately 3 and 4 o'clock in the afternoon.

Class B runs were customarily assigned on a weekly basis to bus drivers who also had morning and afternoon Class A assignments to operate buses between the civilian communities previously mentioned and White Sands. During the years 1952-1954, when such a Class B run was

assigned to a driver for a particular week, he was expected to make the four scheduled daily trips, as well as make his morning and afternoon Class A trips and perform at least some other duties during the week, such as obtaining gasoline, oil, and water, and performing the weekly checking and greasing operation. A driver operating four daily Class B trips of the sort mentioned in this paragraph during a particular week was customarily excused from washing his bus and from "policing" the bus area during that week. Any time during the workday at White Sands when such a driver was not driving his Class B run or performing other duties of the sort previously mentioned, he was considered by the management at White Sands as being in an off-duty status. One of these periods was the half-hour period at about the noon hour, and this was available and customarily used for the eating of lunch.

On a workday during a week when a particular bus driver was assigned to operate four daily Class B trips of the sort discussed in the preceding paragraph, as well as to operate the usual morning and afternoon Class A trips between the civilian community of his residence and White Sands, he ordinarily did not devote more than 8 hours out of the total period between about 6 a.m. and 6 p.m. to the performance of actual work for the Government. However, the periods of waiting time that intervened between periods of actual work were not long enough to permit the driver to leave the post for the purpose of engaging effectively in activities of his own choice, and this would have been so even if White Sands had not been located in an isolated desert region. Consequently, the so-called "off-duty" time was necessarily spent in readiness to perform the next tour of duty (except for the usual luncheon period around the middle of the day). For this reason, it is my opinion that these periods of waiting time (except the usual luncheon period) represented time spent predominantly for the Government's benefit, and that they should be regarded

as "hours of labor." See *Travis* v. *Ray*, 41 F. Supp. 6, 8 (W.D. Ky., 1941).

The conclusion stated in the preceding paragraph is pertinent only with respect to the particular weeks during which particular bus drivers were assigned to perform four daily Class B trips of the sort previously mentioned, as well as to operate the usual morning and afternoon Class A trips. At all times, the number of civilian bus drivers at White Sands exceeded the number of Class B runs; and each week during 1952-1954 there were some bus drivers with Class A assignments who were not assigned to Class B runs. These drivers either were on duty for the performance of miscellaneous duties from 8 a.m. until 12 noon and off duty from 12 noon until 4 p.m., or were off duty from 8 a.m. until 12 noon and on duty for the performance of miscellaneous duties in the afternoon. Such a driver's off-duty time should not be regarded as constituting "hours of labor," for the reasons given in an earlier portion of this opinion.

Sometime in 1954, the management at White Sands adopted a plan whereby each Class B run of the sort previously mentioned was divided between two drivers. One driver would take the two morning trips, and the other driver would take the two afternoon trips. The driver with the morning Class B assignment was on duty until 12 noon and off duty from 12 noon until 4 p.m., while the driver with the afternoon Class B assignment was off duty from 8 a.m. until 12 noon and on duty after 12 noon. For the remainder of the period involved in the present litigation, each driver with an on post Class assignment during a particular week, as well as a Class A assignment, had a period of 4 continuous hours sometime between his morning and afternoon Class A trips that constituted off-duty time. For the reasons previously stated, such off-duty time did not constitute "hours of labor," in my opinion.

A second special situation which perhaps should be commented upon relates to the establishment, sometime in

1952, of a mixed Class B and Class A daytime bus run between White Sands and Las Cruces.[1] It was a Class B run in that free transportation was provided for guards working at White Sands, and it was a Class A run in that other civilian or military personnel in an off-duty status could ride the bus by paying the customary 25-cent fare. This run was rotated on a weekly basis among the Las Cruces bus drivers with morning and afternoon Class A assignments. On this run, the driver left White Sands at 8 a.m. (after having completed his morning Class A trip from Las Cruces to White Sands) and arrived in Las Cruces at about 9 a.m. From the time of his arrival in Las Cruces until 2:30 p.m., the driver was free to go and do what he pleased, and he was regarded by the management at White Sands as being off duty. At 2:30 p.m., the driver began the return trip to White Sands, and he arrived there at about 3:30 p.m. The period between his mid-afternoon arrival at White Sands and his departure from White Sands to make his afternoon Class A trip back to Las Cruces was on duty time.

The only point that needs to be discussed in connection with the situation outlined in the preceding paragraph is whether the bus drivers' time in Las Cruces from about 9 a.m. until about 2:30 p.m. was actually off-duty time, as believed by the White Sands management, or constituted "hours of labor." It seems clear to me that since the bus driver was in his home town during this period, and was free to spend the time at his home (or elsewhere, if he preferred), and to do whatever suited his fancy, the period

[1] After the establishment of this mixed Class B and Class A bus run between White Sands and Las Cruces, any bus driver who was considered by the management to be off duty in the morning could, if he wished to do so, ride this bus to Las Cruces. Off-duty drivers occasionally went to Las Cruces in this fashion, but it was necessary for such a driver to take annual leave for the time from 12 noon (when his next on-duty period was scheduled to begin) until his actual return to duty at White Sands.

in question was properly regarded by the White Sands management as off duty time." Hence, it did not constitute "hours of labor" for which the bus driver was entitled to receive compensation.

Another special situation requiring discussion arose out of the establishment of a mixed Class B and Class A daytime bus run between White Sands and El Paso sometime during the first half of 1956. The driver to whom this run was assigned for a particular week would, after having made his morning Class A run to White Sands, leave White Sands at 9 o'clock in the morning for El Paso. Since the most direct route from White Sands to El Paso through the desert was normally closed to traffic at that time, the trip over a longer route would usually take about 2 hours. The driver would customarily get back to White Sands at about 1 p.m. The driver, while holding this assignment, was regarded by the management as being off duty from 8 a.m. until 9 a.m., and off duty again from the time of his return to White Sands from El Paso at about 1 p.m. until 4 p.m.

Applying the principles outlined in earlier portions of this opinion to the situation described in the preceding paragraph, it seems to me that the 1-hour period between 8 a.m. and 9 a.m. actually constituted waiting time spent predominantly for the benefit of the Government and, therefore, was within the category of "hours of labor." On the other hand, it appears that the 3-hour period in the afternoon, between the time of the bus driver's return to White Sands from El Paso at about 1 p.m. and the beginning at 4 p.m., of his actual work in preparing for his afternoon Class A trip, was sufficiently long to constitute an off-duty period rather than a waiting period predominantly spent for the benefit of the Government.

When the facts pertaining to the individual plaintiffs (see findings 27-35) are considered in relation to the legal principles discussed in this opinion, it appears that the

plaintiffs Jose V. Baca and J. E. Jones are severally entitled to additional compensation for the daily periods between 8 a.m. and 9 a.m. on those days during 1956-1957 when these respective drivers operated the daytime mixed Class B and Class A bus run between White Sands and El Paso, as well as a morning and afternoon Class A bus run; and that the plaintiffs Floyd D. Campbell, Rodolpho Martinez, and James M. Simpson are severally entitled to additional compensation for 3½ hours per day on those days during 1952-1954 when these respective drivers operated on-post Class B bus runs for two morning and two afternoon trips per day, in addition to operating morning and afternoon Class A bus trips. It further appears that the plaintiffs Verney R. Bianch, Cecil R. Gillespie, and Werttie L. Haney are not entitled to recover, and that the petition should be dismissed as to them.

The facts relating to the plaintiff Nick V. Serna are somewhat different from those relating to any other plaintiff whose cause was presented at the trial. The plaintiff Serna, after having had a period of previous employment as a bus driver at White Sands, resumed such employment on October 13, 1952. He was assigned to operate a Class A bus run between Alamogordo and White Sands. In December of 1952, he and another bus driver, in addition to performing their duties as operators of Class A bus runs, were assigned to assist the bus master. It was contemplated by the management at White Sands that one of these men would assist the bus master from 8 a.m. until 12 noon, and then would be off duty from 12 noon until 4 p.m.; and it was contemplated that the other man would be off duty from 8 a.m. until 12 noon, and would then assist the bus master from 12 noon until 4 p.m. The assistance consisted of preparing and issuing trip tickets to other drivers, typing duty rosters, answering the telephone, and relaying the bus master's instructions to other drivers. The plaintiff Serna, after becoming an assistant to the bus master, continued to operate the morning and afternoon

Class A bus trips between Alamogordo and White Sands, but he was not required to perform other duties of the sort customarily performed by bus drivers during their on-duty time at White Sands (such as "policing" the bus area, operating Class B bus runs, etc.).[2]

Although not required to do so, the plaintiff Serna, with the knowledge and acquiescence of the bus master, frequently rendered assistance (of the sort previously mentioned) to the bus master during his "off-duty" time at White Sands. Hence, it is clear that the plaintiff Serna actually performed services for more than 40 hours per week during many of the weeks that are involved in the present litigation. However, the evidence also makes it plain that it was mutually understood by the plaintiff Serna and the White Sands management, at the time when the plaintiff Serna was assisting the bus master during his "off-duty" time, that he would not be compensated for such services. Therefore, the work that he did during his "off-duty" time must be regarded as constituting voluntary services, for which he cannot afterwards properly claim compensation. *Goode* v. *United States*, 25 Ct. Cl. 261, 267 (1890). It necessarily follows that the petition should be dismissed as to the plaintiff Serna.

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[2] The plaintiff Serna was formally designated as a "section leader" in February 1956. His duties in that position were approximately the same as they had formerly been in his role as assistant to the bus master.

APPENDIX B

UNITED STATES COURT OF CLAIMS

No. 489-57

JOSE V. BACA, ET AL.

v.

THE UNITED STATES

Clerk's Office

Washington, D. C., July 15, 1960

To Attorney of Record and Assistant Attorney General and Commissioner.

Sirs:

Please take notice that in the above-entitled cause there has been entered this day on the plaintiff's motion for rehearing the following order:

Overruled.

Very truly yours,

WILLARD L. HART
Clerk, Court of Claims